

ANTITRUST MODERNIZATION COMMISSION

PUBLIC HEARING

Thursday, November 3, 2005

Federal Trade Commission Conference Center
601 New Jersey Avenue, N.W.
Washington, D.C.

The meeting convened, pursuant to notice at 10:00 a.m.

PRESENT:

DEBORAH A. GARZA, Chairperson
JONATHAN R. YAROWSKY, Vice Chair
BOBBY R. BURCHFIELD, Commissioner
W. STEPHEN CANNON, Commissioner
JONATHAN M. JACOBSON, Commissioner
DONALD G. KEMPF, JR., Commissioner
JOHN H. SHENEFIELD, Commissioner
DEBRA A. VALENTINE, Commissioner

ALSO PRESENT:

ANDREW J. HEIMERT, Executive Director and General
Counsel

WILLIAM F. ADKINSON, JR., Counsel

TODD ANDERSON, Counsel

HIRAM ANDREWS, Law Clerk

KRISTEN M. GORZELANY, Paralegal

C O N T E N T S

Hearing: Criminal Remedies

Panelists:

SCOTT D. HAMMOND, U.S. Department of Justice,
Antitrust Division

ANTHONY V. NANNI, Fried, Frank, Harris, Shriver &
Jacobson LLP

TEFFT W. SMITH, Kirkland & Ellis LLP

CHARLES R. TETZLAFF, U.S. Sentencing Commission

These proceedings were professionally transcribed by a court reporter. The transcript has been edited by AMC staff for punctuation, spelling, and clarity, and each witness has been given an opportunity to clarify or correct his/her testimony.

P R O C E E D I N G S

CHAIRPERSON GARZA: Well, let's open the hearing then -- the Antitrust Modernization Commission hearing on Criminal Remedies.

I would like to thank all of our distinguished witnesses for appearing before us. Thank you for your testimony, which I know I found to be very interesting and in some cases provocative, and probably some of the other Commissioners share my view.

I wanted to just briefly explain to you what procedures we will follow.

We will begin by asking each of the witnesses to summarize his testimony in about five minutes, quickly summarize your testimony, and we will go in line starting with Mr. Hammond.

Then following that, Commissioner Jon Jacobson will take the lead for the Commission initially with about 20 minutes of questioning.

After that, each of the Commissioners here will have an opportunity to ask their own questions, ten minutes each, and we ask the Commissioners to please try to observe the ten-minute guideline so that we can promptly conclude

the hearing on time, and if there is an opportunity left, which I suspect there will be, then we will allow Mr. Jacobson and do a ten-minute wrap-up of any hanging issues.

So that is how we will proceed. There are these lights on your table and our table, green, orange, and red, to give you an indication where you are in time. I am not in the habit of stopping people in the middle of their answers or their statements, but I would just ask you to please observe the time so we can get as much in as possible.

And with that, Mr. Hammond, would you like to take five minutes to summarize your testimony for us?

MR. HAMMOND: Thank you, Madam Chair.

I thank all of the members of the Modernization Commission for the invitation to be here today and to present the views of the Department of Justice concerning the issues identified for study in the area of criminal remedies.

The detection, prosecution, and deterrence of criminal cartels is the single highest priority of the Antitrust Division, and appropriate remedies are vital to achieving this result.

The questions on criminal remedies raised by the

Commission are very interesting. But for the most part, they are not novel. Congress, the Sentencing Commission, the Justice Department, the ABA, and members of the defense bar, have repeatedly and very recently considered and debated their merits.

For example, Congress weighed many of the same issues when deciding whether to raise Sherman Act maximum penalties 18 months ago, as did the Sentencing Commission when it was considering amendments to the antitrust sentencing guidelines just eight months ago.

And while the decision in *Booker* has had a profound impact on federal sentencing in general, it does not add a new dimension to the thinking on any of the Guidelines issues raised by this Commission.

That case was decided and vetted well before the Sentencing Commission held its hearings to amend the revised antitrust sentencing guideline.

So with the time that I have for my opening remarks, I would like to briefly summarize the history of the unwavering support that the antitrust fine methodology has received from the Department of Justice, the Sentencing Commission, and Congress.

In 1987, the Sentencing Commission adopted 2R1.1,

using the volume of commerce affected by the violation rather than pecuniary loss as the primary measure of harm. The Commission determined that courts had historically used volume of commerce for antitrust sentencing, and that volume of commerce is an acceptable and more readily measurable substitute.

The best empirical data available to the Commission in 1987 estimated average price-fixing overcharges to be ten percent of the volume of affected commerce, and the Commission used that figure to set corporate antitrust fines.

Three years later, in 1990, Congress raised the maximum corporate fine for Sherman Act violations tenfold, from \$1 million to \$10 million, as part of the Antitrust Amendments Act of 1990.

In 1991, the Sentencing Commission incorporated antitrust fines into Chapter 8. The Commission reaffirmed and continued the use of volume of commerce to measure economic harm.

It set the base fine amount at 20 percent of the volume of affected commerce to reflect the fact that losses from antitrust offenses exceed the presumed ten-percent overcharge and to preserve effective levels of corporate

antitrust fines as Congress had just directed.

In 1996, the Antitrust Division began to prosecute international price-fixing cartels affecting unprecedented amounts of U.S. commerce, and as a result we began to see Guidelines corporate fines regularly exceeding the \$10 million Sherman Act maximum.

By last year, Congress decided it was time to revisit the issue of antitrust criminal penalties, and once again, the response was a tenfold increase in the maximum corporate fine, this time to \$100 million.

The legislative history of the 2004 Act explicitly endorsed the Commission's 20-percent loss presumption. It states:

"Congress does not intend for the Commission to revisit the current presumption that 20 percent of the volume of commerce is an appropriate proxy for the pecuniary loss caused by a criminal antitrust conspiracy. The presumption is sufficiently precise to satisfy the interest of justice and promote efficient and predictable imposition of penalties for criminal antitrust violations."

The legislative history also contains this unambiguous statement of Congress's intention with regard to maintaining the current Sentencing Guidelines methodology:

"The increase in the Sherman Act statutory maximum fines are intended to permit courts to impose fines for antitrust violations at current Guidelines levels, without the need to engage in damages litigation during the criminal sentencing process."

When the Sentencing Commission revised the antitrust guideline earlier this year to implement the provisions of the 2004 Act, it left the 20-percent presumption unchanged, quite appropriately, given the legislative history, and the fact that Congress had just increased the maximum tenfold to better accommodate the substantial fines, indeed punitive fines, that are called for by the antitrust fine guidelines. And so today we celebrate the two-day anniversary of the newly minted 2R1.1.

In sum, for 18 years now there has been unswerving support from the Justice Department, the Sentencing Commission, and Congress for stiff corporate antitrust fines based on a company's volume of commerce affected by the violation.

Preserving the effective and enforceable sentencing methodology set forth in 2R1.1 is vital to promoting deterrence of *per se* antitrust offenses.

Madam Chair, I think I will conclude my opening

remarks.

CHAIRPERSON GARZA: Thank you, Mr. Hammond.

Mr. Tetzlaff.

MR. TETZLAFF: Thank you, Madam Chair and members of the Commission.

My name is Charles Tetzlaff. I am the general counsel for the Sentencing Commission. As you can imagine, as staff, we are somewhat constrained as to what we can say here today, particularly in the form of opinions. We are as interested in hearing the comments of my fellow panelists as you. But we did think that I could address basically a little bit about the Commission, the amendment process that the Commission follows, and a little bit about the most recent Guidelines that Mr. Hammond just referred to, as well as, if I have time, a brief comment on the state of federal sentencing after the *Booker* case.

The Sentencing Reform Act of 1984 established the Commission, which is a bipartisan, independent agency, within the judicial branch of government. It consists of seven members nominated by the President, with the advice and consent of the Senate. No more than four of those members can be of the same political party, and no more than three can be judges. Both the Attorney General and the

chair of the Parole Board are *ex officio* non-voting members of the Commission.

The enabling legislation that established the Commission really gave it a three-fold charge:

First, to establish sentencing policies for the federal courts, including the establishment of Sentencing Guidelines.

Secondly, to advise the executive and legislative branches of government regarding effective crime policy.

And thirdly, to collect, analyze, research and distribute information and data with respect to federal sentencing, as well as sentencing in general.

The Guidelines themselves were developed and promulgated in 1987, and they were designed to do three things:

First, to incorporate the purposes of sentencing which traditionally are deemed to be just punishment, deterrence, incapacitation, and rehabilitation.

Secondly, to provide certainty and fairness by the reduction of unwarranted disparity. There was felt to be – and there were a number of studies supporting this at the time – unwarranted disparity in federal sentencing.

And thirdly, to reflect in that process the

advancements in human behavior.

The amendment process itself that the Commission follows is geared to a May 1st date, which is the time that the Commission has to have any amendments up to Congress.

Backing up from that, the Commission basically sets its priorities, identifying those issues which it intends to address in the amendment cycle in the summer.

Then the policy work by the staff is done throughout the fall. The Commission publishes proposed amendments in the spring. They vote to promulgate in April, and then submit those new amendments to Congress May 1st of each year.

Those amendments to the Guidelines become effective November 1st unless Congress modifies or disapproves of them.

The recent action by the Commission in the antitrust area followed the June 2004 Antitrust Criminal Penalty Enhancement and Reform Act of 2004, which increased the statutory maximum penalties under the Sherman Act by, first of all, increasing the statutory maximum imprisonment from three to ten years. It also raised the statutory maximum for individual fines from \$350,000 to \$1 million, and increased the statutory maximum of corporate fines from

\$10 million to \$100 million.

Mr. Hammond has stated the legislative history that the Commission looked carefully at with respect to the fines in which Congress indicated there was no need of revision of the existing Guidelines, and on page 4 of my written testimony, you will see that set forth in quotes.

The Commission formed a staff policy team which reviewed the applicable Guidelines, analyzed the case law, and the Commission data.

We always contact the interested parties in the criminal justice system for their input. That included the DOJ antitrust section, the ABA antitrust section, and indeed we reached out to members of your staff.

Written comments were received from the Department of Justice and the American Bar Association. We also received written comments from our standing advisory committees, both probation officers and members of the defense bar, and we also reached out to the federal defenders.

The Commission published proposed amendments and requested public comment, which was received from the Department of Justice, the American Bar Association and the federal defenders.

The Commission held a public hearing in April of this year at which both the Department of Justice and the ABA testified.

Subsequently, the Commission amended the antitrust guideline, 2R1.1, by first of all raising the base offense level, which is the starting point for determining the Guidelines range of imprisonment, from a level ten to a level 12.

It also amended the volume of commerce table which enhanced the base offense level based on the volume of commerce affected. The table was in need of updating due to depreciation of the dollar.

Data also indicated that the financial magnitude of antitrust cases had significantly increased over the years, and there was a desire on the part of the Commission to provide increased deterrence.

The Commission raised the threshold one had to meet before the enhancement applied from \$400,000 to \$1 million and provided additional levels at the top of the table as high as a level 16 if the offense involved more than \$1-1/2 billion.

They also amended the commentary to make clear to the courts to consider relevant chapter 3 enhancements, such

as role in the offense, abuse of trust, and obstruction of justice.

The amendment was submitted to Congress on April 29th, and as Congress took no action with respect to the amendment, this past Tuesday, November 1st, that amendment became effective and is now in full force and effect.

As I see my time has expired, I will reserve on the *Booker* case. I would add one thing, if I may, and that is – one of the important things that the Commission provides to all parties – and I feel somewhat in the middle here with the government on one side and the defense on the other – but we can provide data to the parties who are interested in these issues.

Since the *Booker* case came down in January of 2005, the most recent data that the Commission has looked at, which is as recent as last month, out of 41,579 cases sentenced since the *Booker* case, 61.9 percent of the sentences issued were within the Guidelines range.

That is pretty comparable to the rate prior to the 2003 PROTECT Act. If one adds in those departures that were either approved or sponsored by the government – in other words, substantial assistance and the early disposition program or so-called fast track cases, that rate

goes over 85 percent.

So it would appear that the courts are continuing to abide by the Guidelines. Indeed that was the message from the *Booker* case. The Guidelines are alive and well, as is the Commission.

As I said at the beginning, the Commission is in somewhat your position in that they are listening to various views and opinions, and they look forward to our staff bringing back to them the views expressed by my fellow panelists, and they are going to be particularly interested in any views and opinions and recommendations that you have at the end of your work.

Thank you.

CHAIRPERSON GARZA: Thank you. Mr. Smith.

MR. SMITH: My name is Tefft Smith, and I am very grateful for the opportunity to appear before the Commission.

The views I express here and that I did in my written comments are my own. They do not reflect the views of my law firm or any of my partners or any of my clients.

I hasten to add that neither the current statutory framework nor the Division's enforcement policies are broken. And I honor the role the Division has played

and must play in combating price fixing. Price fixing is something everyone agrees is a serious crime deserving of serious punishment.

But that punishment should be focused first and foremost on punishing and thereby deterring the individuals responsible for the price fixing. Companies do not fix prices. There should be certainty that individuals will be timely and persistently prosecuted.

The effort should be made at least to try to send the right people to jail for significant periods of time. I respectfully submit that the Division's enforcement program has become mis-focused on securing large, headline-grabbing corporate fines as the measure of the Division's success. There is and has been an under-focus on the prosecution of individuals. This is in large part because of the past successes of the Division in having companies confess to price fixing to gain the amnesty benefits that are available under the Division's corporate leniency program, which gives both a pass on any corporate fine to the first in amnesty applicant as well as a full pass for all individuals of that company involved in the price fixing.

To refocus the Division, I urge that the Division's two WMDs be taken away as unnecessary to and a

distraction from the Division's own stated enforcement mission: to detect and deter price fixing.

The Division's WMDs, their weapons of mass demands, are first the Sentencing Guidelines' 20-percent impact presumption, which is compounded by the size of organization factor that they use in setting the multiplier. And that formula is mechanically applied to calculate and demand excessive corporate fines.

The second WMD is the alternative sentencing statute, Section 3571, which the Division relies upon to evade the Sherman Act's \$100 million maximum corporate fine.

Now notably it was the Division that asked for the \$100 million statutory maximum as an added stick to its corporate leniency program. But significantly, at the same time, the Division also asked for and got an added carrot. That was the detrebling of civil damages and the elimination of joint and several liability for the first-in amnesty applicant.

The Division did so first to encourage corporate confession under its leniency program, but importantly and secondly, they did so because of the Division's fear that someone some day might force the Division to court under Section 3571 because of the excessiveness of its corporate

demands and simply say the emperor is wearing no clothes, when they seek to apply 3571.

The Division obviously believes that a Section 3571 loss would hurt the Division's corporate leniency program. That is a program that Scott Hammond has said has cracked more cartels than "all other tools at our disposal combined."

The reforms that I recommend in my written comments are all directed at enhancing confession and cooperation. By my experience, more confession and cooperation, more effective antitrust compliance programs by private practitioners, and most importantly, more Division credibility for principled fairness can be obtained with less excessive corporate fines.

This will especially be true if the Division works harder at preparing cases against and timely prosecuting, one, any companies that are slow to confess. They need to establish credibility that they will seek to impose on later-in confessors proportionally, more onerous, but still principled corporate fines.

And secondly, prosecuting the individuals who actually are responsible for the price fixing.

As Scott Hammond has said, "In our experience,

individual accountability through the imposition of jail sentences is the single greatest deterrent."

I really appreciate the fact that we have an independent Commission that will address and focus on these issues.

Thank you.

CHAIRPERSON GARZA: Thank you.

Mr. Nanni.

MR. NANNI: Thank you, Madam Chairwoman and members of the Commission.

I am both pleased and honored to be here to address you this morning. In my oral comments I would like to emphasize a single basic point:

In my view, current antitrust criminal penalties, both with respect to the new ten-year maximum period of incarceration for individuals, and corporate fines as implemented through the current Sentencing Guidelines, are too severe.

Antitrust criminal enforcement has properly always focused on deterrence rather than punishment for its own sake. I think Scott Hammond and I agree on that, and I understand his comments to support that notion.

But in my view, the ten-year maximum period of

incarceration is grossly in excess of what is necessary, reasonably necessary and appropriate for effective deterrence.

In addition, while a \$100 million fine – or even a fine in excess of \$100 million in some cases – certainly is appropriate, I believe that the methodology in the current Guidelines ramps up corporate fines at such a rate that you can get excessive fines in typical antitrust cases.

I think that if one considered fines and fines alone, without being part of a framework of penalties, including treble damages on the civil side – which are indeed a penalty because civil plaintiffs are seen as private attorneys general, and are seen even standing alone as a deterrent mechanism – on the one hand, and the focus on putting culpable individuals in jail on the other, which is indeed a very effective enforcement tool. If you didn't have those other pieces of the framework, of the deterrence and punishment framework, then maybe you could justify massive corporate fines as envisioned and as now implemented in the Guidelines. You could argue that those are necessary and appropriate.

But I don't think that huge fines are necessary and appropriate given the fact that it isn't fines alone or

finest primarily that are the big deterrent in antitrust enforcement.

I think you get to the point where you get to over-deterrence, when you add all these elements in. And over-deterrence has significant social costs. It isn't necessary to feel sorry for antitrust offenders. They violate the law, they're robbing consumers.

But over-deterrence in the first instance clearly gives too much leverage to the prosecutor. There aren't going to be many individuals who are going to want to run the risk of a trial if they can go to jail for ten years, and so you're going to have the prospect of forced settlements. Prosecutors typically do this, and it's their right to do this, but they will offer favorable terms particularly in weak cases so that individuals will not effectively have their right to trial because they can't afford the ten-year risk and they will take the favorable deal.

Similarly, corporations, when faced with the prospect of treble damages and the massive ramp-up in fines that one has under the — at least up to \$100 million and even beyond — are going to settle even in cases where the prosecution may be ill advised.

So in sum, I would reduce the ten-year maximum to five years for individuals. I think it is more than enough, more than enough, deterrence, because antitrust individual offenders are not typically CEOs. You're not talking about Enron here. You know, there isn't any big pot of gold for personal gain. Most of the money -- that is most of the value -- goes to the corporation.

There is, of course, some advancement and there are some bonuses, but it's not a huge pot of gold for individual offenders. So it doesn't take a lot of deterrence to stop that kind of behavior and to get an executive to focus.

So I don't think we should put antitrust crimes in the Enron category.

And also I think that corporate fines, with the Sentencing Guidelines and the implementation of the fine structure, I think that the Sentencing Guidelines should take into account the fact that there are significant treble damages that are also a part of the enforcement mechanism. And I simply think that is not done today.

So at the end of the day when you have this kind of leverage -- leverage is always part of the criminal system, and it's properly so -- but when you have over-

leverage, you get to the point that the system gets out of balance, and in my view, you get situations where you can start to question whether the system is really fair. Does the system effectively mandate settlements rather than the kind of fair contest that I think is part of our society and our democracy.

Thank you.

CHAIRPERSON GARZA: Thank you.

Commissioner Jacobson.

COMMISSIONER JACOBSON: Thank you.

I want to thank each of the panelists for their distinguished papers that were filed with the Commission, very high quality, really addressed the issues before us. And before going into the questions, I do want to say that I don't think anyone doubts that what the Antitrust Division has done over the last eight years in particular in magnifying the importance of criminal antitrust enforcement and extending it to the international arena has been anything other than superlative.

And as Mr. Smith indicated, I don't think anyone on the Commission believes anything is terribly broken here. There are some issues that go to the sentencing process that are in the questions that we put in the Federal Register,

and those would be the focus of my questions today.

I want to start with one that was not really covered in your written presentations, and I'm going to start with Mr. Nanni and go over to Mr. Hammond and ask you each to address it.

That is, whether antitrust sentencing should attempt at least to distinguish between the case of the CEOs of the competitors in a hotel room dividing up the world for a given year, versus the case of the sales personnel or the assistant vice president in charge of pricing on the phone or at lunch meeting with his or her counterpart at the rival about the prices they are going to quote to the customer the next day or the next month, without necessarily exchanging commitments, but clearly engaging in conversations they shouldn't be having.

Should antitrust sentencing make a distinction between those two types of cases and does it in actual practice today?

MR. NANNI: Well, I think it should be taken in two parts. One, fines, corporate fines, and one, individual sentences.

I think corporate fines, the current system clearly takes some of that into effect. I don't think it

matters so much from punishing the corporation whether the top man was involved or whether a vice president was involved. The corporation, its volume of commerce roughly reflects its importance to the conspiracy, the harm it's done, and I think that the Guidelines in terms of fines gets roughly to the right place.

One can argue, though, in the case of individuals that are targeted whether the Guidelines give a sufficient distinction between the CEO types and those that are just managers or leaders.

It's easy to become sort of a manager or -- I forget exactly what the Guidelines say, but they talk about managing five or more people that are part of the conspiracy, and so you can easily have that, or easily meet those criteria without really distinguishing between, let's say, the vice president/division head and the CEO or the top guy in a major corporation that sets the extremely bad tone for the entire firm. And so perhaps maybe there should be a way to capture that. I'm not sure how it would be implemented.

MR. SMITH: Well, I don't think there should be any difference in the corporate fine. The corporate fine should be appropriately calculated, but it really goes to my

point about individual enforcement, and if the CEO is involved in some way, the Division should prosecute that individual aggressively.

Where I find the problem in the current structure is in the excessive discretion that is given to the Division in determining the size of organization where they can and do, as I explain in my paper, sort of play it both ways.

They enhance the corporate fine by using the portion of the Guidelines that relate to size of organization, and they use a standard that is really standardless and to which they have given no transparency, which is this idea of willful ignorance in order to increase the size of the organization for purposes of enhancing the multiplier, which then generates a very, very large fine.

Yet they then do not charge or even carve out of the prosecution those individuals who they claim to be willfully ignorant, and it seems to me it's a little bit like I say, that they are having their cake and eating it, too, in terms of generating these excessive fines.

Part of the problem is the lack of any transparency out of the Division as to how they are going to apply these standards and they have dramatic effects.

So bottom line is I think that they need to send

a message for purposes of future compliance and making credible compliance programs that if they are going to say it was a big organizational, cultural problem, they should send that message through individual enforcement, not just through calculating a headline-popping fine.

COMMISSIONER JACOBSON: Mr. Tetzlaff, I know this may be a difficult one as general counsel to the Sentencing Commission, and maybe you could address more of how, if at all, the Guidelines take these factors into consideration, rather than whether they should.

MR. TETZLAFF: Yes. I would, obviously without getting into such issues as charging decisions and plea agreements and such, the Guidelines themselves — I would say a couple of things.

First of all, the Guidelines themselves, I would say, under chapter 3, there is an effort to deal with the role and the offense that the defendant has been involved in, and I would agree with Mr. Nanni that I think under the existing Guidelines, they make those kinds of distinctions and give the court the ability to take into account such things as the role that the defendant had in the offense.

But over and above that, I think you had even under the pre-*Booker* Guidelines, you had the role of

departure that a judge could execute, and now in the post-*Booker* world, we have advisory Guidelines and the court -- I'm sure the parties can make their respective arguments to the judge, and if the court felt that it was appropriate, it may deviate from the Guidelines under what we are referring to as variances.

But I am suggesting that I think there is the ability even under the Guidelines to deal with the issue, but I think also the court has some discretion.

COMMISSIONER JACOBSON: If you get to court.

Mr. Hammond.

MR. HAMMOND: First of all, before I answer your question about the Guidelines, I just want to, as a basic premise, assume that because you created a very sexy, hard-core case with the presidents in the room, in the hotel room, meeting together, and then the alternative scenario wasn't quite nearly as attractive. But I'm going to assume that for purposes of your question, we determine that this is a hard-core cartel violation that should be prosecuted.

Now your question was how did the Guidelines measure culpability and do they measure relative culpability when looking at two scenarios, one involving very, very high level officials, and one involving not-so-high-level

officials.

COMMISSIONER JACOBSON: It's not just to the Guidelines. As a matter of policy, should there be a distinction both in terms of the corporate and individual sentences from case A to case B. That's really the question.

MR. HAMMOND: Well, then I will address individual as well because I thought you were just asking about corporate.

The high level involvement -- the Guidelines measure or take into account relative culpability, aggravating factors, such as the one you just described, in three possible ways:

The first one is we measure culpability through pecuniary gain. That would not take into account what level within a company that an executive was involved. So it doesn't appear there.

The second measure for relative culpability would be the culpability score. That does take into account whether or not high level officials were involved in an offense. So that would come into play.

Now it doesn't ask the question or break it down as precisely as you have in your question with respect to

whether it was a CEO or a head of the global unit or something like that, but it certainly does take into account high-level involvement.

Now I should point out this is chapter 8. This is not an antitrust guideline. This is the guideline that is used for all corporate fines.

I have to take issue with the comments of Mr. Smith that suggest that we are playing games when we are calculating a culpability score. I am concerned that he would make this suggestion to this Commission. I am very concerned that he would make it while I'm sitting next to the general counsel of the Sentencing Commission.

We don't play games with calculating a culpability score. We are consistent when we calculate the culpability score, and I can assure you we do prosecute the highest-level officials that we can and that the evidence supports.

Now with respect to individual culpability, that is certainly taken into account with respect to whether or not an aggravating adjustment is given to an individual, whether it's two points or three points or four points, depending on the role in the offense that they play.

That can result in substantial increases in jail

sentences. So I don't think there is a question, Mr. Commissioner, with respect to individuals that is very much easier to point to in terms of how relative culpability comes into play in individual sentences.

COMMISSIONER JACOBSON: Let me follow up on that with something of a historical base question. Certainly during the Shenefield and Litvack administrations, and I believe when Mr. Nanni was at the Division as well, the basic approach was to take the sales vice president and make her or him a witness against the higher-up, and that wherever possible to seek to prosecute the CEO or the highest possible person in the organization.

I don't have encyclopedic knowledge of all the cases, but in terms of the major cases that have been brought over the last decade or so, it seems to me that the only one where a CEO was really prosecuted was Taubman, involving auction houses, which was the New York field office. It wasn't even the main Justice in Washington.

Is this a policy change that has been made advertently, or what else explains the fact that much more of the individual prosecutions now are at the midlevel of the organization as opposed to the highest level?

MR. HAMMOND: Well, for one, these are

international prosecutions. So back in the day, you know, you may have had electrical contracting, plumbing, other regional conspiracies. You were often prosecuting the president, the sole owner, the person who was in the hotel room reaching the agreements.

In an international price-fixing conspiracy, we have -- we don't find the chairman of the board, with the exception -- I can think of one involving Mr. Ian Norris in the *Carbon Products* investigation, but for the most part those individuals we have had no evidence have been involved in the formulation, the carrying out, or knowledge and participation in the conspiracy. I would love to find that evidence, and I can assure you if we had it, we would be prosecuting those individuals. But it hasn't existed.

But, you know, my first and immediate explanation that comes to mind is we are prosecuting a whole new animal with these international conspiracies involving multinational corporations than the prosecutions that I think you are referring to back in the '70s and '80s.

But let me -- if you are interested, we have prosecuted 30 individuals this fiscal period just ended. I will give you the titles of those individuals and then you can decide whether or not you think they involve lower level

people or whether or not they are high level people.

They included six owners; one CEO; four presidents; one head of a business group; two heads of marketing for a business group; 12 vice presidents; and one global product manager.

Now when I added that up, I think that was 26. So I'm not sure what the other four were. But I hope you agree —

COMMISSIONER JACOBSON: Do you have the cases? You're looking at a document. Would it be possible to get that submitted to the Commission as a supplement to your testimony?

MR. HAMMOND: I don't have the cases listed. I just had statistically what they were. You know, these are all — every one of the positions I think I just mentioned are named in — I can help you out, but these are charged in informations and indictments where their titles are spelled out.

I don't think it comes — well. I think it contradicts quite clearly what has been said about the individuals that we are prosecuting.

COMMISSIONER JACOBSON: We have heard from Mr. Smith on this subject. Mr. Nanni, do you have any views on

this subject?

MR. NANNI: I want to second what Scott has said in the sense that when you've got a large corporation as opposed to a smaller one or one that's privately owned where you have the owner-entrepreneur who is the president and he's hands on in his involvement in the meetings, as you get to the larger sort of bureaucratic, multilayered, multinational corporations, or even those that are purely domestic but they're large enough, you're not going to get the top people involved in the actual day-to-day price fixing. It's usually some other division leader or some other vice president or even maybe senior vice president who is going to be involved. That's point one. And I agree with him on that, and it's always been that way.

And two, as you go up the ladder, you know, it's easier to convict someone who went to the meeting than it is to convict someone who has sent somebody to the meeting or is just laying back because it's hard to get more than one witness who has some knowledge that the top man was involved and approved of the activity.

And so it has always been true, and I am sure it is still true, that at the end of the day you're not going to get -- it is very rare to get -- the big multinational or

national large corporation CEO or top guy as your antitrust defendant.

But I think that just underscores my point, which is that ten years is too high. I think that the atmosphere in Congress has always compared antitrust to Enron and firms with similar conduct, but there is a big pot of gold for those guys that are taking the corporation down the wrong road. They get multimillion dollar payments, and incredible stock options. But most of your antitrust defendants are not in that league.

COMMISSIONER JACOBSON: Thanks. I appreciate that.

I do want to move on to another area which I think is central to what we are looking at, which is does the company — and I'll just use some numbers as an example — with \$4 billion in affected sales always deserve a higher fine than the company with \$2 billion in affected sales? And what if the margins in the industries are so completely different that the overcharge from the \$2 billion company is \$400 million, but the overcharge from the \$4 billion company is \$100 million? Do they still deserve the same fine? What mechanism is there for even advancing arguments that they don't, and at a higher level shouldn't the 20-percent

presumption in the Guidelines before you get to multipliers, which makes it I think Mr. Smith said 32 percent, shouldn't that be at least rebuttable as the ABA had proposed?

Mr. Hammond.

MR. HAMMOND: Well, Congress didn't think so. They certainly instructed the Sentencing Commission not to touch that 20-percent proviso, and they made very clear that they didn't want to see the type of damage calculations that are envisioned in your question taking place in antitrust sentencing.

So, no, I don't think that would be appropriate, and based on the legislative history apparently Congress didn't as well.

But I — you know, you were talking about shouldn't there be — what is wrong with precise — what is wrong with calculating gain or loss, you know, making it precise, and it's done in other offenses. You didn't mention that, but of course it is. And all I can tell you is what you will find in the advisory notes and commentary in the Sentencing Guidelines, and what you will find in the legislative history on this, and that is we are not setting out to figure out what the pecuniary gain is. The goal is not to figure out what the damages and restitution are. The

singular goal is general deterrence.

So Congress and the Sentencing Commission have come up with a predictable, uniform, easier-to-use approach to calculate punitive fines.

So if your criticism is I'm not sure we're getting precisely the right fine based on the precise harm, that's not the objective. I mean you may think that should be the objective, but that is not what was set out with this methodology.

COMMISSIONER JACOBSON: Actually, it's a bit different. It's that the statute, once you get above \$10 million or now \$100 million, the statute that we are talking about talks about gain or loss, and the sentencing mechanism talks about sales, which is different than gain or loss, and there is clearly a disconnect between the statute on which the fine is based on the methodology for calculating the fine. It may be that it's the right way to go and maybe there is no other practical way to do it, but it's clearly -- there is clearly a disconnect there.

MR. HAMMOND: Well, I guess I respectfully disagree because I think -- I mean Section 3571 is meant to establish a new statutory maximum. The Guidelines are meant to determine what is the appropriate fine for this

individual defendant. So I mean to the extent there is a disconnect, it is trying to associate 3571 and suggest that that is how we calculate individual fines. 3571(d) is meant to figure out what is the appropriate maximum fine in a criminal offense, whether it's antitrust or drug dealing or whatever it is. If you are in a conspiracy, all members of the conspiracy should have the same statutory maximum fine. That's what you go to 3571 for, what is that maximum fine going to be.

When you decide to figure out what is the appropriate fine for this particular defendant, you don't go to 3571(d), you go to the antitrust sentencing guidelines and those guidelines will look at the individual's conduct.

So I mean I agree there is a disconnect to the extent that one looks to gain or loss for the offense as a whole, and one only looks to individual sales. But that is based on the fact that one is setting a maximum while the other one is picking the individual fine.

But let me just pick up on one other point, because you pointed out, well, what if there is evidence that this - in the same - well, it wouldn't be in the same conspiracy. What if there is evidence that somebody is grossly greater than ten percent in the pecuniary gain or

much lower?

Well, the Sentencing Commission has anticipated that issue. It's in application note 4, and it instructs judges, if you have that situation, then take that into account where within the Sentencing Guidelines range you sentence the defendant.

So in your situation, if you have a defendant in which ten percent dwarves what the actual pecuniary gain was, I hope the judge would take that into account in sentencing the defendant at the upper end of the Guidelines range.

COMMISSIONER JACOBSON: My time has expired, but I do want to ask Mr. Tetzlaff a follow-up on this. To what extent was that — did the Commission consider in setting the Guidelines initially and in its most recent revision or revisitation of the Guidelines the fact that 3571(d) is a gain or loss statute, and the mechanism for calculating that gain or loss — and I'm going to respectfully disagree with Mr. Hammond in terms of the optics of it — the mechanism for calculating is purely sales based.

MR. TETZLAFF: I can't speak to what they did prior to my time, and I guess I would have to be nonresponsive to when they did it — when I was here.

The reasons for the amendment were pretty carefully set forth as our reasons for amendment. Going beyond that, we are reluctant to if you will create a legislative history, and so therefore I would prefer not to respond to that.

COMMISSIONER JACOBSON: We have our own General Counsel here who would agree with that.

Thank you, Madam Chair.

CHAIRPERSON GARZA: Thank you. Commissioner Burchfield.

COMMISSIONER BURCHFIELD: Thank you, Madam Chairman.

What is our time limit?

CHAIRPERSON GARZA: Ten minutes.

COMMISSIONER BURCHFIELD: Ten minutes?

CHAIRPERSON GARZA: Uh-huh.

COMMISSIONER BURCHFIELD: Thank you.

First of all, I appreciate the statements of the panel. I read them with great interest, and your opening comments were also quite helpful.

Mr. Hammond, let me start with you and just ask, does the Department as a matter of policy ever use the \$100 million maximum in the statute, or does it always in its

plea negotiations and presumably when it prosecutes corporations, use the 3571?

MR. HAMMOND: Well, we use the Guidelines, and so if the Guidelines range results in a sentence above the statutory maximum, which of course was \$10 million and has been the basis of all the sentencings that we have had so far with respect to corporations, I believe, if the fine goes above the statutory maximum, that's when we would rely on 3571, and then we would — I guess I'll stop there. Does that answer your question?

COMMISSIONER BURCHFIELD: Well, I think so, but the Guidelines, as I understand them, are derived from 3571.

MR. HAMMOND: No, sir. The Guidelines require us to look at what the volume of affected commerce is, at which is not a gain or loss calculation. It is looking what is the scope of the conspiracy in terms of the products that were affected during the conspiracy period. So we would use that figure to calculate the base fine, multiply that base fine by the culpability score, and that will give us a fine range.

Let's assume going forward that that fine range is between \$49 million and \$98 million. We would not then need to rely upon 3571(d) in order to get a fine within that

range, or at least to make a — we continue to follow the Guidelines. Whether a judge decides to depart from them will be in the judge's discretion subject to *Booker*, but that would be a fine in which we would not need to invoke 3571(d) in order to obtain.

Now if the fine range instead, sir, was between say \$101 million and \$202 million, then — and we were seeking a fine then above \$100 million, we would need to rely upon 3571(d) in order to do that.

COMMISSIONER BURCHFIELD: The calculation would be the same, wouldn't it?

MR. HAMMOND: We would —

COMMISSIONER BURCHFIELD: Under the Guidelines?

MR. HAMMOND: You would apply the Guidelines just as you had before, but if we seek a fine above \$100 million, you have to look to 3751(d) in order for the authority to do that. And if the — you know, post-*Booker*, if we are going to do that, the defendant either is going to have to admit that 3571(d) justifies a fine above the statutory maximum, or we are going to have to prove to a jury beyond a reasonable doubt. And, you know, that hasn't happened yet. That is, it hasn't happened that we have had to prove it.

You know, sure as I'm sitting here, I'm sure one

day we will have to do it, but it hasn't happened yet.

COMMISSIONER BURCHFIELD: It sounds like the only time there is a difference, if you are using the \$100 million maximum or 3571 in terms of the calculation, is going to be if you are put to the proof under *Booker* and you are looking to collect more than \$100 million.

MR. HAMMOND: No, I want to make sure we're both clear on this.

COMMISSIONER BURCHFIELD: Okay.

MR. HAMMOND: If we were in a situation now where we are seeking to obtain a fine above \$100 million, and the corporate defendant says prove it, okay, and we set out to do that, and let's assume that we are successful in showing that the pecuniary gain is say \$200 million. Okay? And that creates now a new statutory maximum of \$400 million. That's what we have proved: a pecuniary gain of \$200 million, 3571(d) sets a new maximum twice pecuniary gain, the maximum is \$400 million.

COMMISSIONER BURCHFIELD: Right.

MR. HAMMOND: But, remember, based on the affected volume of commerce, the fine range was \$100 million to \$200 million. Okay. We would still be recommending a fine within the Guidelines range and the judge couldn't go

above the Guidelines range without showing that — you know, that the guy fell outside, and that an aggravating factor existed pursuant to chapter 5 to justify a fine above the Guidelines range.

The fine — my point is the fine would not be \$400 million. We would still be making a recommendation, still relying upon the Guidelines sentencing methodology and the affected volume of commerce to calculate the fine.

COMMISSIONER BURCHFIELD: I understand that. I don't think we are disagreeing.

MR. HAMMOND: Okay. Well, I'm sorry then if I went on too long if we agree.

COMMISSIONER BURCHFIELD: No, I think I understand your position, and I don't think it is inconsistent with what I was saying.

MR. HAMMOND: Okay.

COMMISSIONER BURCHFIELD: Mr. Tetzlaff, you had, in your opening remarks, alluded to some comments you were going to make about *Booker*, and I wanted to give you an opportunity to comment briefly on at least one aspect of *Booker*, and that is, is it your understanding that if the Justice Department were to be in a situation where it was seeking more than \$100 million in fines and the defendant

were to contest that in court, it would have to prove beyond a reasonable doubt the line of commerce, the volume of commerce issue?

I think Mr. Hammond alluded to that just now.

MR. TETZLAFF: You are asking me for a legal opinion, and I guess I would respond this way:

I have on occasion discussed this issue with Mr. Hammond because I was curious as to what the Department's position on this was because I thought that it's a legitimate question, and I was interested to hear his response that he has just given to you that my understanding is that from the department's perspective they would believe that if they are going to proceed under 3571(d), they would charge it, in other words, plead it and prove it to a jury beyond a reasonable doubt.

I guess I would say that's of interest to me, but I would —

COMMISSIONER BURCHFIELD: And to us.

MR. TETZLAFF: — but I would not render an opinion.

MR. HAMMOND: Commissioner Burchfield.

COMMISSIONER BURCHFIELD: Mr. Hammond, you may comment on that.

MR. HAMMOND: I'm sorry, just because your question was sending me back to him, saying do you agree with -- what is your thought on Mr. Hammond's position that they would have to prove volume of commerce beyond a reasonable doubt.

We wouldn't have to prove volume of commerce beyond a reasonable doubt. In a 3571 hearing, it's proving gain or loss. Once we have established a new statutory maximum and we are back in front of the judge calculating the Guidelines, we are not going to prove volume of commerce beyond a reasonable doubt.

COMMISSIONER BURCHFIELD: You have to prove gain or loss, which seems to me to be an even more elaborate proof.

MR. HAMMOND: I agree with you. I agree with you.

MR. NANNI: There is one difference in calculating gain or loss, in that the gain or loss under 3571(d) is for all -- for the entire conspiracy in the view of the Department of Justice -- whereas the Guidelines focus on the volume of commerce of the individual defendant.

MR. SMITH: As long as we are commenting on this and free flowing, the fact of the matter is that absent a

legislative change, they wouldn't be able to proceed, in my judgment, under 3571 because the legislative history makes it very clear that that was to be a judicial determination and you have the proviso to 3571 which says that you can't even use it if it would unduly complicate the sentencing process.

Therefore, the Division has a little disconnect there between the two, and that's why their position has always been that they will not allow the 3571 issue to be litigated in front of a judge. So they won't accept a company coming in and saying I'm willing to plead guilty to price fixing, but I want to contest the amount of the fine. They will not allow that.

COMMISSIONER BURCHFIELD: Well, that was my next question, Mr. Smith. The question is why would a defendant plead guilty and agree to pay more than \$100 million in light of the difficulties of proof that everyone seems to believe the Justice Department would have in justifying a sentence above \$100 million by proving the gain or loss.

MR. SMITH: And the reason is twofold:

One, a desire to buy peace; and secondly, the fact that, as I submit with all due respect to the Division, that you buy protection for your people, the carve-outs.

COMMISSIONER BURCHFIELD: The non-carve-outs.
Right?

MR. SMITH: Right. And usually the carve-outs are going to be, as experience teaches it, treated fairly moderately if they are willing to plead themselves and there is a real question as to whether the Division will ever actually even prosecute the people that they carve out.

COMMISSIONER BURCHFIELD: Well, I do want to ask Mr. Hammond about that because he seems, by his reaction, to have something to say.

Before I let him comment, let me ask him a precise question, and that is, Mr. Hammond, what is the department's policy about the relationship between the negotiation of a corporate fine and the number of carve-outs, if there is any such policy?

In other words, does — Mr. Smith seems to be suggesting that a corporate defendant, by perhaps paying a larger fine, may be able to gain greater protection for some of its individuals. What is the department's policy on that?

MR. HAMMOND: Well, a couple things. Let me give you the department policy as it has evolved since the '90s.

Back when we began prosecuting with the *ADM* case

back in the mid-90s, if you look at the first international prosecutions we brought in Lysine and citric acid, sodium gluconate, those first international cartels that were cracked, you will see the companies for the most part who pled guilty and cooperated, it was a single individual carved out for prosecution, and those individuals received no jail sentences.

Why did we do that? Well, we were trying to get access to cooperation, evidence, documents located overseas, and we were cracking cartels of a kind that we had never seen before.

Well, as we got more experience and more confidence and increased our ability to obtain assistance from countries overseas, we got tougher, and beginning in 1999 we put our first European national, in vitamins, into jail, a Swiss executive.

Since then we have put 19 more foreign nationals in jail for a total of 20 foreign nationals who have submitted to U.S. jurisdiction, traveled to the United States, and served time in U.S. prisons for violating the U.S. antitrust laws.

Most people find that extraordinary.

Now in addition to saying no, no

more no-jail sentences, you will have to spend time in a U.S. prison if you would like to put this behind you, we have some incentives for folks who do that, including Interpol red notices and the like, and I won't bore you with that now unless you would like to hear about it. I'm happy to talk about it, but one other thing we did was we began to ramp up the number of carve-outs. We said to companies, look, you better get in and get leniency, because if you don't, we are going to be holding individuals accountable and we are going to be holding an increasing number of individuals accountable. The day of a single carve-out is gone. And now you will see regularly four, five, six or more carve-outs going to the very top of what we are able to develop evidence of involving participation in the conspiracy.

Now to answer your question, typically there would be four, five, or more carve-outs.

Now let me please explain to you this carve-out policy because I don't want there to be any misunderstanding. This is very important stuff.

When we are in negotiations with a corporation, and the corporation is looking for peace, wants to put this matter behind it, we tell the corporation these are the individuals

that we are going to carve out from the non-prosecution protection that's provided in the plea agreement.

So whether it's four, five, or six, whatever it is, these individuals are going to be subject to prosecution. They are not protected by this corporate plea agreement.

The next thing that we do is insist that those individuals have their own separate counsel. We then meet with the counsel for each and every one of those – or certainly provide the opportunity. Most of these people are overseas, but they do get separate counsel, and we do meet with them, meet with the counsel for each of those individuals and tell them they are subject to prosecution. We are in negotiations with the corporation for a plea agreement. You are going to be carved out of that plea agreement as things stand now.

This is your opportunity. If you have any information that this went higher than your level, this went above you, we don't have the right person in our sights, now is the time to tell us. Now is the time when you can help yourself. Now is the time when you may have the opportunity to avoid serving time in a U.S. prison or being put on an Interpol red notice watch, spending the rest of your life as

an international fugitive. Now is the time.

And if they point the finger up, we rework our carve-outs. If instead the buck stops with the top person, it didn't go any higher than me, no one else was involved, I'll accept responsibility, I'll travel to the United States, I'll serve time in a U.S. prison, we close that corporate deal, we cover people above the carve-outs and below the carve-outs, we give the company what it asked for with its peace, it can move on without the threat of possible future prosecution, and those individuals who we have evidence of involvement and those individuals who could not point any higher are subject to prosecution.

Now it has been suggested in the paper and today, not just that we are not picking the right people, but that we are not even prosecuting them. I don't know what to say except to provide you with some statistics which I hope will speak volumes to you.

This last fiscal year that just ended one month ago, we obtained over 13,000 individual jail days, and the average jail sentence was 24 months. Those are both records in the Division's history. Breaking a record, I might add, that was just broken just two years ago when we set new marks.

Now I will be happy to talk to you about the length of the typical foreign national jail sentence. It is certainly a lot less than 24 months. It averages around five or six months. So certainly there are outliers above and below just like there are every year.

But, please, follow me as I take you through a trend that supports what I just said about individual accountability.

The average jail sentence in the '90s was eight months. In 2000, it was ten months; 2001, 15 months; 2002, 18 months; 2003, 21 months; 2004, it dipped to 12 months; 2005, back up to 24 months.

Over the last five years, we have averaged jail sentences over two and a half times what they were in the 1990s.

So any suggestion that we don't take individual accountability seriously flies in the face of those statistics, and frankly it's an insult.

And anybody who is paying any attention to what we are doing globally, to what I did last year at the OECD, when we organized public prosecutors, the first time ever at the OECD, to talk about individual accountability, and the importance of it, for deterring hard-core cartels. And what

I am going to be doing next week in Seoul, when I meet with prosecutors from 35 different countries and probe and cheerlead and try to get them to move with us towards criminal enforcement of the antitrust laws. And the developments that have taken place in Australia, in Japan, in the UK, where we have helped those countries see the wisdom of individual accountability.

I mean I could not stress individual accountability more and the importance of jail sentences in our enforcement program. And any suggestion that we take a wink at it in our corporate plea agreements, or that we trade money for time is dead wrong.

CHAIRPERSON GARZA: Thank you. We are going to move to Commissioner Cannon, please.

COMMISSIONER CANNON: Mr. Hammond, thank you for that last answer. It kind of anticipated what I wanted to talk about, that I think the panel has raised, but we really haven't addressed directly, which is the discrepancy or the differences in corporate interests and individuals' interests. Having come from a corporation, I'm kind of aware of that, where it is obviously the case, and it can develop very rapidly that the interest of any individual really will diverge from the interest of the corporation, as

we think about it, and a lot of people think that the corporation are the individuals, but that's really not true.

So that being the case, one thing I have been involved in that is of interest to me here as well is in this investigation, I mean I'm assuming that in a relatively early stage of the investigation, this discrepancy can occur, even from the corporate standpoint, looking at your D&O coverage. You know, there are some things that it doesn't cover. As an officer, you really can't violate the law and think that someone is going to write a check for you. It doesn't work that way.

You know, most corporations have agreements in the insurance coverage where the company can advance defense costs if someone needs their own counsel, but if it gets adjudicated that they in fact broke the law, then they are supposed to write a check back.

So that's my question, how early in the investigation does this occur, and then one other kind of a related question. I know that now there is a lot of concern in issuing questions about the waiver of attorney-client privilege, which obviously belongs to the corporation as opposed to any individual at the corporation. And can you talk about actually both those things?

MR. HAMMOND: Sure. Well, in our investigations, obviously we are pushing corporations to obtain independent counsel for executives as soon as we perceive that there is a potential conflict.

COMMISSIONER CANNON: And is it the case where the corporate – someone who is representing the corporation, they should be able to figure that out relatively early, probably more early than you do?

MR. HAMMOND: Well, no, sometimes we figure it out before they do.

COMMISSIONER CANNON: Really?

MR. HAMMOND: Sometimes we are in possession of evidence that they are not. But we are, by Department of Justice standards, we in the Antitrust Division are – well, I'm searching for the right word. "Wimps" doesn't really seem like it's appropriate. But we are not nearly as prone to insist on waivers of attorney-client privilege in our investigations, and I'm going to tell you why.

You have just pointed out rightfully that there can be a conflict of interest that exists between the corporation and the individuals, but our experience has been in antitrust cases that oftentimes the corporation and the individual can find their interest aligned, even when they

are under investigation, and even when amnesty is no longer available in that investigation, because of our amnesty plus program.

Over 50 percent of our international investigations were generated as a result of a lead developed in a completely separate investigation. What that means is that in our investigations, the corporations have been very successful in mining their executives, mining the information that the executives have, not just about their involvement in the conspiracy currently under investigation, but other conspiracies that the government and, until they ask, the company is not aware of.

That is a dynamic that we are very interested in promoting and that we are very generous in rewarding. So we are, because of that experience and that success, we do see that there are going to be times when the corporation and the individual's interest can be aligned and that it can result in benefits for the company and the individual through the amnesty-plus program.

So to answer your question, partly because of that basis, we have not taken the stand quite as often as you have maybe observed with the criminal division in the U.S. Attorney's Offices where they will often insist on a

waiver of attorney-client privilege as a condition of cooperation.

COMMISSIONER CANNON: And it may not be an insistence on privilege, but a waiver nonetheless because they are, as you say, mining information about other things. Part of that information has come to them where the individual in question has gone to a corporate lawyer, in-house counsel, or perhaps outside counsel, and said, gee, I want to tell you this, you know. And in a company, we always -- essentially you have to give them the equivalent of a *Miranda* warning, saying you can tell me this. You know, remember this can be privileged information, but you don't own that privilege. The company owns that privilege and it may choose to waive it at some certain time.

MR. HAMMOND: But, remember, sir, that the reasons why the interests could be aligned in an antitrust case where it wouldn't, for example, be if you were being investigated for defrauding the Department of Defense, let's say, is because our amnesty program, our voluntary disclosure program aligns the interest of the individual and the corporation because they are both going to be protected if they are self-reporting.

COMMISSIONER CANNON: The individual will as

well?

MR. HAMMOND: The individual will as well. All the individuals will. All the cooperating individuals will.

So when you sit down in an antitrust investigation and you are trying to get one of your employees to tell you something that the government doesn't know about, you can say to that individual, look, if you tell us the truth and if you tell me about an antitrust violation and we have an opportunity to race in to the government and all of us will be protected -- you, me -- you know, you, the company, your colleagues, everybody.

That's not going to be the case under the Thompson memo. That's not going to be the case under most of the other -- the Thompson memo is referring to corporations doing the right thing, coming in, disclosing what they know, turning over oftentimes information from their internal investigation. For what purpose? To prosecute the individuals from that corporation. The interests are not going to be aligned in that situation. The company is mining its individual for the purpose of getting a deal for the company at the expense of the individuals.

COMMISSIONER CANNON: Mr. Smith.

MR. TETZLAFF: I just wanted a point of

information, Commissioner Cannon, that as you probably are aware, the Commission amended Chapter 8 a year ago.

COMMISSIONER CANNON: In the commentary, I think.

MR. TETZLAFF: In the commentary, correct.

Having to do with the culpability score, and just for a point of information, the Commission has placed that issue on its list of priorities to take a look at this amendment cycle, so they are going to take another look at that.

COMMISSIONER CANNON: I serve on the ABA task force on attorney-client privilege, which is why I was interested in that. But I'm assuming you will take that up, and I think it's on the list of priorities for consideration?

MR. TETZLAFF: That's correct.

COMMISSIONER CANNON: Mr. Smith, I wanted to give you an opportunity. This has been a spirited but polite discourse here, and --

MR. SMITH: Well, certainly I would like to emphasize that I, as I said at the outset of my comments, I certainly respect the efforts that the Division has put in, including in the efforts of improving individual prosecution. My main point is where is the focus. And I think that they have become mis-focused on the big corporate

fines.

But where there is a further tension that exists is the amnesty program makes a lot of sense as an enforcement tool, and the challenge that has occurred and where the perception has become of some of these issues that I talk about in my paper, is, well, what happens to the second, third, and fourth company in? And that's where there is a need in particular for more explication and understanding. Because as I point out, in some circumstances, and I know I had this experience years ago with Tony Nanni, where one company was coming in and they called about two minutes before I called, and there was a disparity of treatment.

And what is the degree of disparity of treatment? Because as you know, as a corporate executive, that when you have to go into the board and make the recommendation that Mr. Hammond would like to see be made is go in. The full panoply of consequences has to be unveiled for them, including all of the civil liability and all the other things.

And so that's where some of the reforms — and I hasten to say they are reforms, I'm not asking that the Division be caned here — that all go to that direction.

COMMISSIONER CANNON: But has it been your experience, though, in representing corporate targets or defendants in these cases that -- I assume you have had any number of circumstances where you have had to recommend or the company has decided that they need to get separate counsel for --

MR. SMITH: Absolutely. And that is something that is, as you can well appreciate as a corporate counsel, and other people have, that's one of the toughest ethical issues that a lawyer personally faces is to decide at what point has the person -- as you say, you start out every one of these discussions with a *Miranda*-like warning that I am counsel for the corporation, I am not your personal counsel, but it is in your interest and the interest of the corporation that you cooperate and tell us the truth. Because we need to know and you need to know and then, depending, at that point, you decide when to recommend that they get corporate counsel -- get separate counsel.

COMMISSIONER CANNON: Has it been your experience, as Mr. Hammond said, that that is not the case or that's less likely to be the case when someone is coming in under the amnesty program versus second or third in by a few minutes?

MR. SMITH: Well, sure, but, you know, that is — if you're going to be the first one in, which you don't necessarily know whether you're going to be the first one in, so you are still doing the *Miranda* warnings whenever you've got to start one of these processes. Although quite frequently, the case has been of late that these prosecutions are kicked off by the fact that there has already been an amnesty applicant. So you are in the situation of trying to assess what is going to happen to the individuals in the companies.

And I know I'm going a little long, but one further point is on that issue of, you know, sequential numbers of greater carve-outs for purposes of an added incentive to come in and confess earlier rather than later.

I'm not sure that that serves the long-term interests of the Division, and I'm not sure it serves the long-term interests of the Division to give a free pass to every single person, regardless of culpability and seniority in the organization, to the first-in amnesty applicant. Because the question becomes how do you deal with that in compliance, and what do you do with those individuals in the corporation. The Division doesn't take a position on that, whereas in other contexts it does.

COMMISSIONER CANNON: Does anybody else —

MR. HAMMOND: Well, anyone who wants to argue with the success of the leniency program or whether we have it right is going to have a —

COMMISSIONER CANNON: I think he's saying he doesn't.

MR. HAMMOND: I thought I heard a moment ago that he questioned whether or not we should be giving leniency to the first person in. But, okay, I apologize.

It was pointed out that there is a big difference between number one and number two, and that is absolutely by design.

There is also a difference between being number two and number three, but we don't want to create a large consolation prize. We want the company to realize that it needs to be first in order to avoid prosecution, and that's where the grand prize is, and not to sit back, not — you can think about it, but just don't think very long.

COMMISSIONER CANNON: Well, the father of the leniency program is at the other end of the table, so he'll have some suggestions.

MR. HAMMOND: Yes, I'm aware of that.

CHAIRPERSON GARZA: We have to move on in order

to make sure every Commissioner has an opportunity to ask questions. And there are a lot of questions to ask. I find that I have a lot and I'll try to pick wisely.

But because we do have Mr. Hammond here, maybe I'll take advantage of your presence.

In the hearings that we held on civil remedies, it was suggested by a number of the witnesses that the combined threat of criminal fines and treble damage liability has not sufficiently or isn't sufficiently deterring cartel conduct, including recidivist conduct, and maybe it's the case that we haven't seen the full impact of the recently increased Sherman Act fine and jail levels, or the full impact of the more recent international cooperation in anti-cartel enforcement.

But, Mr. Hammond, you do state in your statement that recidivism rates are relatively low. What is your view — based on what you have seen of the department — whether the current sanction levels, including the threat of treble damage litigation, are significantly deterring cartel activity?

MR. HAMMOND: Because in Mr. Smith's remarks, he talked about the fact that there is a good deal of recidivism in antitrust cases, I did go back and look at

this before appearing here today.

We went back and looked over the last ten years to try to determine what number and what percentage of our cases involved corporate recidivists, and we found that the percentage was two percent, and I believe that there were four examples of a corporate recidivist. So I would suggest that -- that to me sounds very low. More on that in a moment.

I will say that when I testified at the Sentencing Commission, one of the panelists came armed with a number of statistics, and he claimed that antitrust offenses involve the lowest number of recidivists than is found in any other federal crime. I don't know if Charlie has that information to verify that or not, but that was the testimony of one of the individuals last March.

Now we have to be clear on what a recidivist is. I'm talking about situations where a corporation pleads guilty on one offense, and then turns around and continues to participate in an antitrust crime and is subsequently caught and sentenced for that.

So if we all agree that's the definition of a recidivist, we have four examples in ten years. And I'll talk about one of them in a moment.

Now we have corporations who have been prosecuted multiple times, and they are pervasive in their failure to comply with the antitrust laws, but those involve situations where we detected one crime and sentenced for it, found out that the company didn't take advantage of the amnesty-plus program that I referred to earlier, was engaged in other conspiracies – these are multinational companies involving other products, and we found out about that, and we prosecuted them on the second crime, and you will find their names listed in our top 50 fines on more than one occasion. We've got a number of those folks. But they are not – they are not a recidivist, at least as I understand that definition.

Now let's talk about one recidivist, Hoffman-LaRoche was fined in the citric acid conspiracy – I believe an amount something around \$14 million. They were one of the companies that I mentioned before in which I think we had a single carve-out. They got a no-jail deal.

And as I mentioned, in 1999, we took a different approach. This time the commerce was a lot more, justified the much higher fine. This was the company that was fined \$500 million, and we carved out three executives, I believe all Swiss. Maybe one was a German executive. And they all

went to jail, and these are the first individuals to go to jail ever in the United States from Europe.

Now we haven't seen Hoffman-LaRoche back again. In fact, we haven't seen any companies, any recidivists, multinational foreign-based companies who have revisited their time with the Antitrust Division after having one of their foreign nationals go to jail.

You know, I can tell you what I hear, but all of you have diverse practices. If you are not practicing in this area, you have partners, and I suspect that what you are hearing as well is that when we put foreign nationals in jail, even if it's just for four months or six months, that is having a very significant deterrent impact.

I'm going to stop here, but if anyone would like me to talk more about whether it makes sense to have four to six month jail sentences, I'll be happy to do it. But if there is no disagreement on that, I'll stop.

CHAIRPERSON GARZA: Let me ask you another question then, Mr. Hammond. Mr. Nanni and Mr. Smith say in their written testimony that the cartel - I'm characterizing what they say, I hope fairly - that cartels in fact may be relatively rare, at least successful cartels, given the difficulties of forming cartels, policing them, and they

suggest, I think, that the resulting price increases may actually be relatively short lived or subject to significant cheating with respect to larger customers, at least.

Would you care to comment or can you comment based on the types of evidence that you have seen in various cases on those observations?

MR. HAMMOND: Well, I mean we used to hear that, too, I think, but I think once we started bringing some of these conspiracies – the vitamin conspiracy lasting ten years, Sorbate conspiracy lasting 17 years, you know, I thought that pretty much debunked the myth that conspiracies were relatively short lived and collapsed on themselves.

We are prosecuting conspiracies quite often that are multiyear, as I said, as long as a decade, or longer.

You know, in terms of that, they are also causing a minimum amount of harm, you know, I – that is not what our experience has been in the Antitrust Division investigating these cartels. I have cited to you some studies. There's the most recent one from Dr. Connor and Dr. Lande is an extensive survey looking at the price – a survey of studies – analyzing the price effect of cartels in which they conclude that the median overcharge was 25 percent, and that the bigger the cartel, the – not

just the bigger the harm in terms of broadly speaking, but the higher average overcharge.

So I would not — well, I hope that responds to your question in terms of what I think about those issues.

CHAIRPERSON GARZA: Well, some observers have suggested that the success and effect may be greater for bid rigging schemes and for other price-fixing conspiracies. I know you have mentioned Lysine and others, but — and most of the empirical studies that you cite in your paper other than the Lande-Connor, do relate to bid rigging. Do you think there is a legitimate basis for distinguishing between the two types of activity, bid rigging and other types of price-fixing activity?

MR. HAMMOND: Well, the Sentencing Commission did, and that's why, at least for individuals, they have the upward adjustment for bid rigging.

In terms of whether do I — I'm sorry, I just don't know. I'm hesitant to give you an opinion as whether or not the average overcharge in bid rigging is likely to be greater than the average overcharge —

CHAIRPERSON GARZA: Or whether it's more likely to occur because it's easier to implement and police?

MR. HAMMOND: Well, I don't know about more

likely to occur, because most of — I mean most of our cases don't involve bid rigging, and certainly most of our international cartel cases don't involve bid rigging.

CHAIRPERSON GARZA: Well, that kind of leads into the — what may be my last question, depending on time. And I could be wrong about this because this whole area is relatively new to me. In fact, up until having to prepare for the hearing, I didn't know very much at all and probably still don't — more after having listened to everybody, certainly.

But I understand that the base fine in the Guidelines was increased based in part of the assumption that a majority of the cases were bid rigging cases which may have been true in the earlier — maybe 15, 20 years ago, and that it was previously considered to be aggravating behavior.

Now is it the case then that in the amendments that they were based on the bid rigging?

MR. HAMMOND: No, that's the first I've heard that.

CHAIRPERSON GARZA: Well, I think I was taking this from the ABA, and maybe I mischaracterized it. I think in the ABA comments I saw something to the effect that the

base fine in the Guidelines was increased based in part on the assumption that a majority of the prosecuted cases were bid rigging.

MR. HAMMOND: When you say the base fine, calculation of the base fine is based on volume of affected commerce.

CHAIRPERSON GARZA: Right.

MR. HAMMOND: And it was set in 1991 at 20 percent. I am not — you know, I am simply not aware.

CHAIRPERSON GARZA: Is it the multiplier that I'm talking of?

MR. HAMMOND: The proxy — well, now, we're talking about culpability scores, and I'm quite certain that the culpability score factors were not set based on bid rigging because those apply to all corporate offense, not just antitrust. So when they put together the culpability score or the factors that are used in calculating culpability scores, I don't think they had bid rigging in mind because chapter 8 and the calculation of culpability scores under Chapter 8 are not specific to antitrust offenses.

CHAIRPERSON GARZA: Okay. Mr. Nanni, you in your testimony had said that — in your oral testimony, I think

you said that you thought that the Guidelines methodology encouraged ramping up too quickly to get excessive fines for the typical antitrust case. Can you elaborate on that a little bit? What do you mean by the typical antitrust case, and what do you mean — what about the methodology leads to this ramping up?

MR. NANNI: Well, the problem I have with the Guidelines methodology is that it assumes a ten-percent overcharge, which you can debate as to whether that's the correct amount or not. But then it's doubled for the deadweight loss to get to 20 percent.

But then on top of that, you have a multiplier which can easily get to one and a half or two. So you are in the 35 to 40 percent of the defendant's volume of commerce — and that's the way the fine is calculated.

That problem wasn't a big problem when the typical maximum fine was \$10 million because you would at least have — if you went under 3571(d) — you would at least have to prove that there was a real loss, at least from the offense, to justify the fine over \$10 million.

But in light of *Apprendi* and *Booker*, the Division recognized that it didn't want to incur that burden in a typical case, and so it asked for and it got \$100 million

new maximum.

And so what happens is now you can have fines easily ramped up by 35 percent or 40 percent of the volume of commerce for the defendant under the Guidelines methodology up to \$100 million.

And so my problem is that when you have such large corporate fines combined with the other framework — *i.e.*, civil treble damages — you really run the risk of pushing corporations to the brink of bankruptcy. You certainly weaken them, and weakened corporations, I think, have the perverse effect of injuring consumers because you don't have innovation, they have higher debt, they may force consolidations within the industry. And at the end of the day you have less competition, which is really not the goal of antitrust enforcement.

And so you come back to the question, why do we have these high fines? What's the purpose of the high fines? It's deterrence. I agree with Scott Hammond, general deterrence is the issue, not so much the economic harm that is caused, which is again the basis for the 20-percent methodology and the multiplier, presumably, as well.

But to put a point on it, you don't need the high fines. I think that there is a cost to it, even perversely

to the consumers that are harmed, and so why do you need such high fines in all cases where maybe the harm is less?

If the harm is there, let the government prove it. Don't establish such a high threshold to begin with. I don't think you need it for deterrence, and if you don't need it for deterrence, you sure as heck shouldn't have it as an automatic penalty.

CHAIRPERSON GARZA: Thank you. I violated my own rules and have gone into the red so let me send it over to Commissioner Kempf.

COMMISSIONER KEMPF: Mr. Nanni, let me start with you. I would ask you to do a favor and only take -- I have a two-part thing, but let me take them backwards.

The thing I would like you to do is picking up on your comment that you think the Sentencing Guidelines should factor in the treble damage aspect, the request is that you submit some precise language on that that we could consider in terms of implementing that.

And then the second thing is could you elaborate on it in terms of what you envision.

MR. NANNI: Well, you have to start from the premise of, you know, how do you judge deterrence, and I think part of the deterrence of antitrust crime is the fact

that there is a penalty of treble damages.

So once you concede that point and you say, okay, what do we do? The Guidelines methodology, in my opinion, does not even consider the fact that there's an additional penalty, an additional deterrence, if you will, that comes from the civil treble damage plaintiffs.

And so, okay, so if our goal is general deterrence, which we all agree, then the question is, well, what is reasonably necessary for general deterrence without going overboard and getting over-deterrence which has the potential negative social side effects that I have talked about. And there are a number of ways in which one could devise a scheme.

One could, in light of the fact that you have a multiplier, one could start off with a smaller base fine. Don't double it to 20 percent. Just take ten percent times the multiplier, whatever. That's one possibility.

The other possibility is that judges, in considering the base fine once all the calculations are done, whatever they are, can be given the right to consider the punitive effects of the treble damage litigation, and that is certainly now not in the Guidelines, and it would be very easy to write it in.

COMMISSIONER KEMPF: Okay. Mr. Hammond, your remarks — I sort of view them as this: Gee, we recently increased the maximum jail time for individuals to ten years, and we've got from \$10 million to \$100 million fine, and so I think everything is hunky-dory.

Now let me ask you a question. Suppose Mr. Nanni and Mr. Smith, instead of taking the position they did, had come in and said, you know, we really ought to think that it ought to go more. It ought to be \$200 million and it ought to be 20 years. Would your reaction be, gee, sounds good to me? In other words, your premise that deterrence is a good thing and the more, the better. And if not, why not?

MR. HAMMOND: Well, quite frankly, with many white-collar offenses, 20 years is possible now under the new statutes that have been passed. We have ten years. We were at three years, and going to ten years seemed like a pretty significant leap to me, although again, it is still dwarfed by other white-collar crime.

So I'm not interested in 20 years.

With respect to a \$200 million fine maximum, I wouldn't have any problem with that. We obtain fines above \$200 million on a few occasions. In fact, we just got one a couple of weeks ago. If the volume of commerce would

justify a fine of \$200 million or more, I would support it.

But, you know, you suggested that I think everything is hunky-dory. I am impressed with what I am seeing with respect to the deterrent effect we are having in our investigations. I am seeing now — I've been in the front office for ten years. I was there when ADM came. I have seen the development over the years. We are now seeing — we are now having — this happens, and I can describe this to you — amnesty applicants coming in to us while simultaneously going into Europe and other countries and saying we would like to report to you an international cartel. But we need to let you know there is one problem: We are going to report it to you, you don't know anything about this, but our guys are telling us actually it didn't affect the U.S., it affected Europe, it affected Asia, it affected markets all around the world, but it didn't — sounds like we actually made an effort not — we stayed out of the U.S. and we did it because we feared detection by the U.S. authorities and jail sentences and heavy fines in the U.S.

Now talk to our guys. We don't expect you to take our word for it. If you find that there is involvement, that's why we're here because we want leniency,

and we do talk to them and we are seeing these cartels where we in the United States are having this kind of deterrent effect.

So I am pleased with the effect that we're having. It's obviously not perfect. We just had a record year that I just described, so obviously we can do more. But I do believe that the U.S. system for criminal remedies is the greatest in the world and is having the greatest deterrent effect.

COMMISSIONER KEMPF: Other than the anecdotal stuff, is there anything in the public domain with more specifics on the deterrent impact? Specifically what are they saying in Europe to people about non-conspiracy in the U.S. for fear of prosecution?

MR. HAMMOND: Well, these are -- the way the public will become aware of those will be when some of these other -- as I mentioned, this is coming to us in forms of simultaneous applications, and so when, for example, the European Commission begins to bring some of these cases involving international cartels and you don't see a U.S. prosecution, please don't mistake that for we just were asleep at the wheel. You won't know this, but the amnesty applicant came into the U.S. as well and we didn't

prosecute, we didn't prosecute anybody because there was not an impact on the U.S.

So that's the way in which -- the only way that I'm aware that you would be able to become -- have specifics on the type of scenarios that I'm describing that -- that is a new phenomenon. I mean this didn't happen several years ago. It's happening now.

COMMISSIONER KEMPF: Last subject area I want to cover. Another area we are looking at is immunities and exemptions, and one difficulty I have with the level of the criminal jail terms and fines is because so much of commerce is price-fixed every day, all day under various immunities and exemptions, and I used the example before, if you're out in Iowa and one guy's a farm and the other guy is a farm implement guy and they both are good price fixers, one goes to jail and the other has a big dinner in his honor. He's on the cover of the farm journals, the man of the year.

I have always thought that the one byproduct of that is that people don't in this country view price fixing as evil as they should because so many of their neighbors do it under immunities and exemptions.

I don't see much antitrust enforcement -- agency attacks on the immunities and exemptions, because of fear of

congressional reaction to that, and I'm not talking about what I view as inconsequential things like the baseball exemption or the Webb-Pomerene Act, which I don't think has a significant impact on commerce, but on the big home run ones like the labor exemption and the farm exemptions which go to everything we eat and everything we buy and cost billions of dollars a year.

But that's something that causes me discomfort in terms of level of fines when two people who are identically situated and do identical things, one is a hero and the other is a felon, and the — as the magnitude of the felon's punishment increases, I become increasingly uncomfortable, given the pass that is given to so much of the price fixing that goes on in plain sight. It's perfectly legal. It's not an exemption or immunity. It is not punished because it doesn't warrant punishment because someone has made the decision that it's fine to price fix in one area but not in others.

How do you reconcile the ever increasing demand for higher fines and higher sentences with the free pass to so much of the price fixing that goes on under the immunities and exemptions?

Anybody can comment on that.

MR. HAMMOND: Well, the way I reconcile prosecuting those who are involved in price fixing is — I don't know if you will take comfort in this because obviously you are very troubled by this, and I understand why. But I want you to understand that the conspiracies that we are prosecuting are not being done out in the open, obviously, and the individuals that we are prosecuting are fully aware that they are violating the U.S. antitrust laws and they are taking steps to make sure that nobody knows about it.

I mean these are not situations where, you know, they have been talking to their neighbor and learned about how they do business and figured it was okay for them to do business the same way. These are folks who are using code names, who are meeting in secret, who are obstructing our investigations, who are taking steps to conceal their conduct, who are not biding the advice of their general counsel and compliance programs, who are not being deterred by the fact that there are heavy penalties. They're doing it, anyway. And they are taking the risk and they don't think they're going to get caught, and they get caught.

So I don't have — I certainly in my position I have to review every single criminal information and

indictment we bring, and I obviously have in the Justice Department prosecutorial discretion and can look at individual facts. But I want you to know I am not seeing cases that are being brought to me for prosecution in which I am convinced that there is some innocent explanation here or some inadvertence, that they crossed the line without meaning to.

These are hard-core — as you pointed out — these are hard-core sentences, but it is also hard-core conduct.

COMMISSIONER KEMPF: Yes. My concern is much less that side of it than the flip side of it. And the reconciling of the two. In other words, vigorous antitrust enforcement is something I applaud. It's just that it troubles me when identical conduct not only is not punished but is cause for celebration.

CHAIRPERSON GARZA: We've got five minutes to go, and I do want to make sure that Commission Shenefield and Commissioner Valentine have time.

Commissioner Shenefield.

COMMISSIONER SHENEFIELD: Thank you very much, Madam Chairman. I appreciate your thinking of the time.

The discussion here, Scott, must stand for the proposition that there is at least a perception — maybe not

a reality -- of some kind of shift in focus from individuals to fines, and you have given us I think quite helpfully some facts.

I wonder whether the Division would consider some year-on-year measurement, and I don't have any bright ideas, that would measure the extent to which the balance hasn't shifted, if I take your position. That is to say what it was in 1990, what it was in 2000, between individual prosecutions and fines.

Without asking you to respond to it now, think about whether there is something you can do, because I think it is fair to say there is a perception out there that this has happened or is happening, and you may want to -- there's no question there. Just think about it.

Can I ask you a question? I mean if you have something you want to say about it, go ahead, but our time is short.

MR. HAMMOND: I am surprised, Commissioner Shenefield, to hear that there is that perception.

COMMISSIONER SHENEFIELD: Well, I think because the discussion here suggests --

MR. HAMMOND: Well, I understand that that perception exists. I'm not -- I'm trying not to be

argumentative. I'm just telling you that if there is a perception that there is a decreased emphasis on individual accountability --

COMMISSIONER SHENEFIELD: Relative to --

MR. HAMMOND: -- relative to criminal fines, I have not heard that on panels or in -- I have not heard that in my job.

COMMISSIONER SHENEFIELD: Okay.

MR. HAMMOND: And if that perception exists, it completely flies in the face of all objective statistics and information that is out there. So if that perception exists, I need to do a better job to make sure that people get the right facts so they can make a real informed decision.

COMMISSIONER SHENEFIELD: None of the objective facts and measurements that you have mentioned today are inconsistent with that perception. So what I am trying to do is suggest that you take a look at some way to demonstrate by objective evidence that that perception is wrong. That's all I'm suggesting.

I think I heard you say that the criminal enforcement program was the most -- was the highest priority of the Division. Could you say with some specificity what

the role of the Assistant Attorney General is in the criminal enforcement program?

MR. HAMMOND: He is the one who decides what the highest priority of the Antitrust Division is.

COMMISSIONER SHENEFIELD: Does he have a hand in any individual charging decision or does he review fact memoranda or does he --

MR. HAMMOND: Yes, he does. Yes, he or she does. The Assistant Attorney General has to sign off, has to approve, be satisfied and approve on every single criminal information and indictment that we bring. The Assistant Attorney General has to sign off before we can even open a grand jury investigation, and the Assistant Attorney General has to review and approve any grant of leniency.

So the Assistant Attorney General is involved in every significant step of the way, but just -- I want to end where I began. I couldn't come here and tell you that the criminal antitrust enforcement was the highest priority of the Antitrust Division unless the Assistant Attorney General, in this case both the departing Mr. Pate and now the Acting Assistant Attorney General Tom Barnett said it first.

COMMISSIONER SHENEFIELD: I've heard them say it,

yes.

Does the Assistant Attorney General counsel with you at all as to specific fines or plea bargaining levels?

MR. HAMMOND: Yes.

COMMISSIONER SHENEFIELD: Why is it then that he or she doesn't characteristically meet with counsel for defendants on those subjects?

MR. HAMMOND: Well, that's not a policy that is new to the Division. That's been one in place, certainly in my 17 years, and I assume it was in place, Mr. Commissioner, when you were the Assistant Attorney General.

COMMISSIONER SHENEFIELD: No, actually it wasn't.

MR. HAMMOND: Oh, it wasn't? Okay. I apologize.

Certainly in the 17 years I have been there, that's the policy. I am the most senior career official in the Division, and the decision has been made that I am the person that should be meeting with parties, and that's the policy of the Division.

Now I think in the last ten years, I can think of maybe three or four occasions in ten years where an Assistant Attorney General met with outside counsel in what I would refer to as a pitch meeting, and in every one of those occasions, the reason for doing so was because it was

deemed that there was such an important policy issue that was on the table that it warranted the participation of the Assistant Attorney General.

The purpose of those meetings was not to discuss what the appropriate fine should be, or what the appropriate jail sentence should be; it was to discuss a policy issue.

So I hope that answers your question.

COMMISSIONER SHENEFIELD: Yes, that is helpful.

Switching topics for a moment, but continuing with you, since we have you for the moment, can you -- do you think there has been any effect in the rate of leniency applications as the result of the detrebling legislation last year? Or whenever it was; a year and a half ago.

MR. HAMMOND: I believe so, but certainly outside counsel, defense counsel, inside counsel are in just as good a position to answer that question as I am. But I can tell you that our amnesty application rate is still very high.

You know, we have a sunset provision, as you know. We have thought about, gee, what are we going to do in five years. How are we going to demonstrate that this is a good idea, and the first thing that came to mind is we would ask every amnesty applicant, well, would you have come in were it not for this detrebling provision? And we

realized that that would be a great big waste of time. Every company wants to come in tell us they came in because it's the right thing to do, and as soon as they found out about it, they raced in and told us about it because it's the right thing to do.

They're not going to come in and tell us they came in because of the detrebling provision. So those statistics really aren't going to be very useful.

So I can't tell you with a but-for analysis here how many amnesty applications we would have had versus what we had today but for that detrebling.

And I'm afraid five years from now, I'm not going to be able to provide them with statistics in that regard. I hope what I will be able to demonstrate to them is the amnesty program is vigorous and it's as successful five years from now as it was when they passed the legislation, and that they ought to reenact the legislation.

COMMISSIONER SHENEFIELD: Well, one suggestion -- and I don't know whether you have done these numbers -- if you take the full universe of criminal prosecutions and take the percentage of that full universe that result from leniency applications, if you saw an increase, you might infer that there was some effect. If you saw a decrease,

you might infer that there was no such effect. But it wouldn't be conclusive either way.

What percentage of all your universe of criminal prosecutions comes from amnesty? Do you have any idea?

MR. HAMMOND: Well, you know, you could ask that question in terms of what percentage of your criminal fines, what percentage of your individual prosecutions, what percentage of your criminal cases, what percentage of your large criminal cases, international cases. I only have a couple of those statistics handy.

I mean well over 90 percent of our criminal fines -- over 90 percent of our criminal fines come from investigations that have been assisted by leniency applications. The vast majority of our large international cases have been cracked in large part by amnesty applications.

Mr. Smith did quote me quite accurately, and this is something again -- I just said it last week at the OECD in front of a group of public prosecutors -- we have all these tools. We now have -- we soon will have wiretap authority, but before that, of course, we had the FBI. We have the ability to do consensual monitoring. We have search warrants, we have all the investigative tools, and yet

leniency has resulted in the detection and successful prosecution of more cartels than all of those other tools combined.

COMMISSIONER SHENEFIELD: Madam Chairman, I will give the rest of my time to Debra.

CHAIRPERSON GARZA: Okay. Commissioner Valentine.

COMMISSIONER VALENTINE: Thanks. Since I have no time, apparently.

CHAIRPERSON GARZA: No. I mean you should feel free to take the full ten minutes, obviously.

COMMISSIONER VALENTINE: Why don't I do this. Why don't I try to be modest in aspirations and play clean-up here.

The ABA's Antitrust Section has suggested that we, the Commission here, make a recommendation that the criminal provisions in the antitrust laws and in the Sentencing Guidelines apply only to hard-core cartels to price fixing, bid rigging, market allocation, customer allocation.

Does any one of the four of you have any problem with that?

MR. SMITH: No, not for me.

MR. HAMMOND: Well, you decide what's the best use of your resources, and I guess the Sentencing Commission will as well. From our perspective, I don't think -- I'm not sure how it could be much clearer. I mean the title makes very clear that --

COMMISSIONER VALENTINE: That's a different issue as to the extent to which it's unclear, but several have suggested it's unclear. Mr. Nanni did as well.

MR. HAMMOND: That it's unclear?

COMMISSIONER VALENTINE: Yes.

MR. HAMMOND: Well, I don't know how it could be unclear. The title says price fixing, bid rigging, and market allocation agreements. The commentary makes very clear that it applies only to those --

COMMISSIONER VALENTINE: I see what it says.

MR. HAMMOND: If someone thinks it's unclear, I haven't heard that explanation.

MR. NANNI: Oh, I don't purport to say that it's unclear, either. I am concerned, though, that when you talk about exemptions, particularly there are antitrust exemptions where there may not be a bright line between those areas where you are in the exemption or whether you are not, or there might be some areas which -- where there

isn't a bright line between what might be called hard-core *per se* conduct and conduct where someone innocently tripped in because of some confusion in the law.

Then you might, my suggestion was, you might want to have those factors which presumably the Division has always considered in deciding whether to go forward and prosecute, but their decision might be a tad aggressive and so I'm just saying that a judge might —

COMMISSIONER VALENTINE: You made a somewhat different suggestion than the ABA's Antitrust Section, that one take those four factors in deciding whether one does potentially — what could be prosecuted civilly or criminally.

All right.

MR. HAMMOND: I would have a significant — well, that's a completely different issue.

COMMISSIONER VALENTINE: Yes, that's a very different question. I actually was not asking that question.

MR. HAMMOND: I don't think the Sentencing Commission —

MR. NANNI: That's the only question that I raised.

COMMISSIONER VALENTINE: Actually, another thing that you did raise, Mr. Nanni, is that you suggested, if I read your testimony correctly, that volume of commerce is not just based on effect on the U.S. market and U.S. sales, and I may be showing my ignorance, but I always thought it was. I thought the Canadians did it on Canadian commerce and the Europeans on European. What am I missing there, or am I totally —

MR. NANNI: Well, I'll let Scott comment, but my position is it should only be based on U.S. commerce. I believe that is the prevailing practice in the Antitrust Division. But there have been from time to time arguments to the contrary. I was just going on record that I thought that that was the appropriate standard.

COMMISSIONER VALENTINE: Mr. Hammond?

MR. HAMMOND: To alleviate confusion, when we calculate the base fine, it is based on U.S. commerce only.

COMMISSIONER VALENTINE: That's what I thought.

MR. HAMMOND: I mean I can give you a longer answer that talks about what happens if there is no U.S. commerce, because a company has stayed outside of the United States pursuant to an agreement to allocate markets, including the U.S. market, in which case there is no

commerce. We still would not look to foreign commerce to calculate the affected volume of commerce, but instead we will say to a judge, don't sentence this defendant at zero commerce, there's an aggravating factor that exists here, so you should go -- so a fine should be crafted that takes into account that there is no commerce because the agreement was to stay out of the U.S.

Now that's only happened -- we have two examples of that where we -- but again, even those cases, we didn't say, look to the foreign commerce in order to calculate the affected volume of commerce. That didn't happen.

COMMISSIONER VALENTINE: Okay. Next question, and this is sort of done in the spirit of *Booker*. Since the 20-percent presumption was set in '91, before the chapter 8 multipliers, before an effective amnesty program, before a plaintiffs bar that learned to quickly file suit once the government announced a plea bargain, a settlement, would anyone have any objection to at least revisiting whether that 20-percent presumption is appropriate and correct? And quite frankly, I am absolutely agnostic as to whether the 20 percent -- after this revisiting, let's pretend that for now we vest it with the Sentencing Commission, but I suppose it could be done anywhere. It might end up at 25 or 15. I

don't particularly know, but would anyone have an objection to at least a revisit of that issue?

MR. NANNI: No, I certainly wouldn't, but I want to point out, I believe that the 20-percent base fine was established before the organizational guidelines were established in 1991.

COMMISSIONER VALENTINE: That's what I thought I was saying, that's what I thought your testimony said as well. Correct.

MR. HAMMOND: Well, I think you know where I stand on that, but if you are going to talk about the 20 percent being set before a number of events took place and so forth, I hope you will at least acknowledge that in 2004, when Congress made it very clear -- and all of those events that you just said didn't exist when the 20 percent was set were certainly in place and Congress was aware of them when they said to Sentencing Commission, do not touch the 20-percent proviso.

COMMISSIONER VALENTINE: Correct. And if I could

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MR. SMITH: If I could respectfully comment on that. At least my limited legislative Hill experience would suggest that that legislative history was a function of the

Division, and that I believe that this Commission weighing in on that issue would be important to assure that it was truly something that received the appropriate and proper attention.

COMMISSIONER VALENTINE: Well, in a sense that's really all I'm asking, which is I have no doubt that it's very easy for Congress to say 20 percent sounds great, it's been very effective in the past, let's stick with it, it's nice and easy. And I do think there should be some way of simplifying the gain or loss, the volume of commerce, whatever the factor is, that calculation. You don't want to be doing trials on that. And quite frankly, Scott, Mr. Hammond, this won't happen unless Congress would in fact decide probably to take our suggestion.

So Congress would be having to think through perhaps in a more focused way. That's really all that would be going on.

MR. HAMMOND: Well, as long as we're clear, we don't write legislative history. It's ridiculous to suggest we did, but you know, this ABA paper that you have in front of you, you do a compare-write of that paper versus the paper that Congress had in front of it when it was considering whether to amend the statutory maximums, and you

will find that they are nearly identical.

So Congress had all of these arguments in front of them when they amended the statutory maximums and when they directed the Sentencing Commission not to touch the 20 percent.

Now with all that information, if you still have decided that you are going to tell them to rethink it again, that's your prerogative to do, but I don't think there should be any mistake that the Antitrust Division writes legislative history or that Congress didn't have these issues in front of them when they said what they said.

MR. NANNI: Just one small subpoint, if I may. I think the question that should be focused, though, is what is the purpose of the base fine. Is it in isolation to eliminate the economic harm or to balance out the economic harm? Or is it general deterrence? And if it is general deterrence, then I come back to my main points, which are that there is more than one kind of deterrence in operation here.

And so your answer to that question that you raised will depend on how you focus the question.

COMMISSIONER VALENTINE: Absolutely correct.

Last question. And here I guess I'm going to

respectfully disagree with those who are suggesting that the United States is not focusing enough on individual punishment. I actually think we may be doing rather well there, but what I find striking is the extent to which other countries do not do that. And it is actually very hard, now speaking personally as someone inside a corporation, it is much harder to incentivize individuals in far-flung countries when they have no personal exposure and no -- quite frankly, there's no impact of any price fixing that they may do on that, for the most part.

I guess this question is mostly for Mr. Hammond, although I'm happy to take ideas from anyone. Is there anything that we as a Commission could do to encourage other countries to focus on individual responsibility and liability as well as corporate responsibility and liability?

MR. HAMMOND: Well, you can join us in our mission. That's what we are devoting an incredible amount of resources to doing, and I will be happy to make available to you the PowerPoint presentations from the public prosecutors conference in the OECD if you are interested in seeing what I said to them.

I began by playing them the Lysine tapes and showing them what this was all about, and then I went on to

talk about the leniency program and in three separate presentations talked about other strategies for fighting cartels, and believe me, the focus all along was on individual accountability and treating these as crimes and treating the individuals as criminals.

So there are other things that would help us in our fight, like it would be great if we could extradite more foreign nationals from more countries and create greater leverage so that we could have longer jail sentences for foreign nationals, but I don't think that this Commission can help us in that.

If I'm wrong about that, then I would be asking you absolutely to help us in that way.

MR. NANNI: Just briefly, I agree with Mr. Hammond on this point. I think the efforts they are making in the international arena today are really part of a continuum of antitrust. In the old days prior to the electrical cases in the '50s, there was a perception that nobody went to jail. And then once that perception hit home, then that changed certain kinds of corporate behavior. And then since jail was only such a small amount, then when it got ramped up and more and more executives went to jail, that changed more corporate behavior. And I think now we

are seeing in the international arena that there was a perception that, well, if you keep your meetings outside of the U.S. or if you are just more careful and don't leave evidence inside the domestic U.S., you would be able to avoid the reach of antitrust enforcers, and I think that the Division has done an admirable job of bringing that home that that's not the case. And so I think we are going to see a change, I think we have seen a change in international behavior, and I think that is largely to the success of the Division and their efforts.

COMMISSIONER VALENTINE: Well, I'm not deluded about the power or persuasive abilities of this Commission, but I am quite serious, if there is anything you think we could do to — certainly you are free to provide ideas at any later point in time, and yes, I would like your PowerPoints.

MR. HAMMOND: Thank you very much for that invitation as well.

CHAIRPERSON GARZA: In fact, anything that anybody wants to provide to us, just feel free to send it to Andrew Heimert here at the Commission.

Commissioner Jacobson has asked for one wrap-up question. We have already kept our witnesses here 15 minutes late, so Jon, if you can —

COMMISSIONER JACOBSON: I am going to pose this just to Mr. Smith and to Mr. Hammond, and ask you to limit your responses to a minute or so.

The question is this:

Given that there are issues with 3571 in that gain or loss really can't be proven beyond a reasonable doubt, and yet it's used in every case to get a fine more than \$10 or \$100 million, would it be a better use of the justice system to provide that the statutory maximum fine under the Sherman Act be raised to \$500 million, \$1 billion, eliminate and repeal 3571(d), and provide that the 20 percent presumption be on sales and the Guidelines be freely rebuttable by specified factors?

And let me start with Mr. Smith.

MR. SMITH: I think that was my proposal in my comments. So that I certainly endorse that because I think that the 3571 escape valve, as I call it, has resulted in a slight unnecessary focus in the Division on trying to get big, big fines and the better point would be to raise the statutory limit, if that's what they think sends the right deterrence message.

And then I believe the Guidelines currently allow a rebuttal of the ten-percent presumption, but the Division

in its policies will not even debate that issue in looking at the fine. They don't make an analysis, and they don't want a presentation on an analysis of impact.

COMMISSIONER JACOBSON: What about just raise the levels, get rid of 3571(d)?

COMMISSIONER VALENTINE: To just antitrust?

MR. HAMMOND: This is a general crime statute, alternative fine statute, so you are talking about repealing it as if it's an antitrust statute. It's not. So I think there may be a lot of other people who would have concerns about trying to address what some perceive as a problem with the antitrust remedies and then repealing 3571 because of it.

You know, when we went to \$100 million, it alleviated the need to rely on 3571. This isn't going to happen as often now as it did when we were just going above \$10 million.

But a suggestion that there is difficulty in proving gain or loss and so let's do a rebuttable presumption creates a bigger headache. I mean the rebuttable presumption will introduce into all criminal sentencings then basically a damage calculation which is precisely what the Sentencing Commission and Congress have

said they want to avoid.

So I mean I understand -- I think I understand where you are coming from in saying let's just do away with 3571 and have \$500 million as a cap, but I don't understand the suggestion that we should have a rebuttable presumption which would introduce a damage calculation potentially into every single sentencing. That is precisely 180 degrees opposite the direction that Congress and the Sentencing Commission and certainly the Justice Department think we ought to be going.

COMMISSIONER JACOBSON: Thank you.

CHAIRPERSON GARZA: All right. Thank you very much to all of the witnesses for your thoughtful statements and your time here this morning. We all appreciate it very much. Thank you.

[Whereupon, at 12:23 p.m., the hearing concluded.]